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ABSTRACT

This monograph reviews a college or university's responsibility for incidents of crime occurring on its campus or in the course of its programs. Part 1 reviews the legal analyses which courts undertake in responding to claims that, under common tort law or contract theories, liability for the injuries suffered by a person ought to be shifted from the victim to the university. It examines theories and cases on duty of care in three models (college-student "special relationship," landowner-business invitee, and landlord-tenant); negligence based on foreseeability of injury risk; and breach of express or implied contract. Part 2 examines a kind of statute that makes the institution a criminal for "permitting" crime on its campus and/or creates a new per se liability protecting students and employees. Four distinct ways in which these statutes may impose liability on academic institutions are discussed: direct criminalization of university conduct, compliance as a condition of federal funding, statutorily created duty of care, and breach of contract. Part 3 catalogs ways in which institutions can reduce the incidence of crime on campus and manage the risk of liability, through education, compliance, prevention, periodic review and modification, and crisis management. (JDD)

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Crime on Campus: Analyzing and Managing the Increasing Risk of Institutional Liability

PHILIP BURLING

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Crime On Campus: Analyzing and Managing the Increasing Risk of Institutional Liability*

SETTING THE SCENE

After more than a half hour of aimlessly walking Lisa Mullins around campus at knife point with no effort to avoid discovery, an intruder forced her into the college dining hall and raped her. In response to Lisa's suit for damages, Pine Manor Junior College sought a legal ruling that it had no responsibility for the criminal acts of unknown third parties. The court rejected this argument, pointing to the College's statements to students and applicants about the safety of its campus and finding that a special relationship exists between colleges and their students creating a duty to protect the latter from foreseeable risks.

But, when William Donnell was assaulted on a public sidewalk immediately adjacent to California Western School of Law and asked a court to find the institution liable for his injuries, the result was different. Concluding that students at a law school are adults and that educational policy requires that institutions should not be overprotective, the court ruled that California Western was not obliged to provide parental care to mature business invitees. Instead, the court measured the Law School's liability by the physical limits of its property. Since Donnell was on a public street, his claim was rejected.

These two cases define the analytical spectrum along which attempts to make colleges liable for losses resulting from crimes on their campuses are adjudicated. Any hope that brighter, more defintive lines may be discerned from them should be abandoned before reading further.

INTRODUCTION

This monograph reviews the general question of a college or university's responsibility for incidents of crime occurring on its campus or in the course of its programs. Preparation of the paper was motivated by the steadily increasing incidence of crime across the country and the equally serious increase in lawsuits seeking to make universities liable to their students and employees when they became victims of such crimes.

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The monograph consists of three parts. Part I recapitulates NACUA's original pamphlet, *Crime on Campus*, and reviews the legal analyses which courts undertake in responding to claims that, under common tort law or contract theories, liability for the injuries suffered by a person on its campus or in the course of its programs ought to be shifted from the victim to the university. Part II examines a new kind of statute which makes the institution a criminal for "permitting" crime on its campus and/or creates a new per se liability protecting students and employees. Part III of the monograph catalogs ways, suggested in the literature, in which institutions can reduce the incidence of crime on campus and manage the risk of liability to victims for whom they may have a duty of care.

Part I:
Common Law Liability for Crime on Campus

Under the common law, courts generally refuse to shift from the victim to a third party the cost of damages arising from criminal conduct, unless certain very specific circumstances can be shown to exist. For such a transfer to occur, a plaintiff must prove: 1) the university owed a duty to the plaintiff; 2) the university breached that duty; 3) the plaintiff was injured; and, 4) if the university had not acted or failed to act as it did, the plaintiff would not have been injured.

The first essential part of this analysis is determining whether or not the university owes a duty to the plaintiff. Courts determine whether duties exist by looking for a contract creating the duty or a set of facts creating a duty under tort law. Over time, courts have utilized different patterns to analyze particular factual situations in determining whether circumstances giving rise to a duty exist. Part I of the monograph examines the way courts currently analyze a set of facts when responding to a suit seeking to transfer the cost of a criminal act from the victim to the academic institution.

THEORIES OF LIABILITY

NEGLIGENCE: DUTY OF CARE

Prior to the 1960's, relying upon an *in loco parentis* model, the courts generally determined that an educational institution owed to its students the duty of a parent to a child. Courts gradually abandoned this model as the pressures of the late 1960's led to general acceptance of the notion that college students were adults.[1]

Three analytical models have evolved to replace *in loco parentis* in defining the relationship between, and correlative duty owed to, a college and its students. The first focuses on whether or not the relationship between the institution and student is intrinsically a "special relationship," giving rise to a duty of care on behalf of the college toward the student. The second model analogizes the college-student relationship to that of landowner-business invitees, and the third model mirrors the more protective relationship of landlord-tenant. No one of these analyses has emerged as the definitive overall standard in the same way that in loco parentis was

1. It is beyond the scope of this paper to speculate on this subject, but an additional reason for abandonment of *in loco parentis* as the definition of a college's duty may have been the tendency to include all members of an institutional community (i.e., students, faculty and staff) within the same analytical framework.

before it fell from favor; therefore it will be necessary to review each, in order to describe adequately a college's potential liability for crime on campus.

College-Student "Special Relationship" Theory

A "special relationship" has been defined as "some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act."[2] A college or university is expected to have an institutional commitment to the welfare and safety of its students. Given this public expectation, most institutions acknowledge their obligation, and subsequently exercise care to protect their students by providing appropriate levels of security. By voluntarily taking this action, a college inherently assumes and reinforces the existence of a special relationship with its students, upon which the latter reasonably rely.

The duty suggested by this relationship is different from that of a college or university acting *in loco parentis*. Indeed, many courts viewing the college-student relationship as "special" have also affirmatively disavowed the doctrine of *in loco parentis*.[3] Instead of acting in the broad role of parent, the college or university is expected only to use reasonable care to protect its natural and assumed interest in the safety and well-being of its students.

Landowner-Business Invitee Theory

The landowner-business invitee relationship has long been recognized as a special relationship for purposes of demonstrating a duty owed in a negligence action.[4] In just such an action against a college or university, the academic institution may be analogized to a landowner owing its student-invitees the following duty of care:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public, while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.[5]

Therefore, a college or university owes its students the duty to use reasonable care in inspecting the premises to discover possible dangerous conditions (physical *and* criminal), and to warn and protect invitees from foreseeable dangers arising from the arrangement or use of the property.

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2. W. Keeton, *Prosser and Keeton on the Law of Torts*, §56 at 374 (5th ed. 1984).

3. *See, e.g., Whitlock v. University of Denver*, 744 P.2d 54 (Colo. 1987), *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331 (1983).

4. Restatement (Second) of Torts §314A (1965).

5. *Id.* at §344.

Landlord-Tenant Theory

A further development of the landowner-invitee relationship is the landlord-tenant relationship, which has been recognized in some states since the early 1970's.[6] In jurisdictions recognizing this higher duty, a landlord must warn a tenant of known or reasonably known dangerous conditions or latent defects under the landlord's control.

In the academic context, the college or university is often the landlord of its resident students.[7] Therefore, a university-landlord must warn its student-tenants when a reasonably foreseeable danger arises in the dormitories. In other words, if a university knows of violent crimes committed on its campus, then, as a landlord, it must warn its students of foreseeable danger, and take reasonable steps to protect them from foreseeable risk.

NEGLIGENCE: FORESEEABILITY

In analyzing the causation element of a crime victim's negligence claim against an academic institution for losses incurred in a campus crime, a reviewing court must determine the reasonable foreseeability of the risk of injury. By definition, a criminal act which could not have been foreseen could not have been prevented, even by one having a duty of care, and courts will not shift the loss to one who could have done nothing to prevent the injury from happening. The only cure for unforeseeable crimes is insurance.

Not surprisingly, this portion of the formula is prone to subjective interpretation, especially because a court poses as an after-the-fact observer of conduct which, by definition, is unacceptable. In some circumstances, foreseeability has totally eclipsed the other three parts of the common law negligence formula, and has become the "touchstone of university liability for criminal victimization of students."[8]

BREACH OF EXPRESS OR IMPLIED CONTRACT

Although not used as often as negligence, a breach of express or implied contract may nonetheless result in a liability action against an academic institution. For example, institutions which provide housing to students may be liable for a lack of security under an implied contract of habitability, or under a warranty of

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6. *See, e.g., Kline v. 1500 Massachusetts Corp.*, 439 F.2d 477 (D.C. Cir. 1970). *But see Rabel v. Illinois Wesleyan University*, 112 Ill. Dec. 889, 514 N.E.2d 552 (Ill. App. 4 Dist. 1987).

7. To date, the landlord-tenant relationship has only been used in cases involving crime in dormitories.

8. Note, "The Liability and Responsibility of Institutions of Higher Education for the On-Campus Victimization of Students," 16 *Journal of College and Univ. Law* 119, 123 (1989).

habitability included in an express housing contract signed by the parties.

In addition colleges and universities often send brochures, pamphlets, and handbooks to prospective students detailing the institution's security policy and provisions. In such cases the university may have formed an express or implied contract with the prospective students to provide specific security measures; and, when these security measures are relaxed or implemented incorrectly, the institution may be held liable for breach of that contract.

CASE LAW

Keeping in mind these theories of liability, we turn to actual cases to first observe how courts analyze the theories, and second, to attempt to discern the evolution of a uniform standard that will predict when a college is liable for crime occurring on its campus.

NEGLIGENCE: DUTY OF CARE

Duty Created by the "Special Relationship" of Student and College

The abandonment of *in loco parentis* developed in a series of cases focusing on university liability for student injuries arising from inappropriate behavior. The best known argument for abandoning *in loco parentis* comes from *Bradshaw v. Rollins*,[9] a case involving an alcohol-related automobile injury after an off-campus beer blast.

> There was a time when college administrators and faculties assumed a role in loco parentis. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country.[10]

The historical point of view taken by the Bradshaw court was supplemented by reference to educational policy in *Baldwin v. Zoradi*,[11] another case involving an automobile accident and

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9. 612 F.2d 135 (3rd Cir. 1979).

10. *Id.* at 139.

11. 176 Cal. Rptr. 809 (Cal. App. 1981). The *Baldwin* opinion is perhaps the strongest statement of the "anti-*in-loco-parentis*" reasoning, arguing for the abandonment of the *in-loco parentis* doctrine because of its perceived adverse effect on student education.

drinking, this time on campus. Finding that the university was not involved in furnishing the alcohol, and did not have any reason to suspect adult students would engage in car races while intoxicated, the court said:

> Only by giving them responsibilities can students grow into responsible adulthood. Although the alleged lack of supervision had a disastrous result to this plaintiff, the overall policy of stimulating student growth is in the public interest.[12]

The willingness of the courts to do away with *in loco parentis* in these cases almost certainly was related to the plaintiffs' willful participation in drinking and subsequent driving. This would explain why, when faced with the same argument in a case involving an on-campus rape, the Massachusetts Supreme Judicial Court found it untenable.[13] Although agreeing that *in loco parentis* was out-dated, the court found a specific duty of care running between colleges and universities and their students based on "existing social values and customs," a rationale that seems rather similar to the abandoned doctrine.[14] The *Pine Manor* court identified the relationship as flowing from:

> . . . the nature of the situation. The concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior. The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to insure the safety of its students. No student has the ability to design and implement a security system, hire unsupervised security guards, provide security at the entrance of dormitories, install proper locks, and establish a system of announcement for authorized visitors . . . Thus, the college must take the responsibility on its self if anything is to be done at all. (citations omitted.)[15]

Given the court's obvious outrage at the College's effort to escape liability on purely legal grounds, it is not surprising that the *Pine Manor* decision stands as the clearest exponent for the existence of a "special relationship" between college and student sufficient to create a broad duty of care.

In contrast, the other side of the "special relationship" theory is explored in a more recent Vermont case. Note, however, that this is a case involving a student's criminal acts against third parties.[16] The victims of the student's off-campus crimes attempted to shift the cost of their injuries to Norwich University on the theory that the school failed to enforce its prohibition of firearms on campus.

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12. *Id.* at 818.
13. *Mullins v. Pine Manor College*, 389 Mass. 47 (1983).
14. *Id.* at 51.
15. *Id.* at 51–52.
16. *Smith v. Day*, 538 A.2d 157 (Vt. 1987).

The student, Kenneth Day, had, on two occasions, used a rifle available to him as a military cadet at Norwich University to shoot the engineers of passing trains. The injured engineers argued that a special relationship existed, not only between student and University, but between themselves and the University due to the University's intensive regulation of the firearms to which its cadets had access. The court rejected this argument, instead adhering to the principles of *Bradshaw v. Rawlings* that a University may not be held liable for the activities of its adult students, and there was no special relationship between the injured parties and the University.[17]

An eloquent discussion of these two competing views of the "special relationship" theory can be found in *University of Denver v. Whitlock*,[18] a non-criminal athletic injury case. This case deserves special attention, and should be read very carefully in the context of determining whether or not a "special relationship" exists between students and colleges in cases involving criminal acts. *Whitlock* involves injuries to an intoxicated student who was exercising on a trampoline, from which, he alleged, the university ought to have protected him.

After an extensive and clear review of other cases, the court extracted a highly relevant point on which to focus its analysis. It draws from the Restatement (Second) of Torts the proposition that one source of a special relationship is the "dependency" of one party upon the other in a way relevant to the particular injury.[19] Finding that the plaintiff was in no way dependent on the University in deciding whether to use the trampoline when drunk, the court reversed a $5,256,000 jury verdict.[20]

"Dependency" may also be used effectively as an analytical tool in the criminal context to distinguish between those situations in which applying the *Pine Manor* solicitude for the care of a student is appropriate, and those in which a dependent relationship did not exist.

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17. *Id.* at 159.

18. 744 P.2d 54 (Colo. 1987).

19. *Id.* at 61. (Citing Restatement (Second) of Torts, §314A (comment b)). This comment notes that the law is "working toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence." For example, this relationship may arise in the academic context when the university deprives a student of "normal opportunities for protection" or assumes responsibility for another's safety. *See Restatement* at §314A(4). Despite its considerable utility in analyzing tort case, the California courts, which originally adopted the theory upon which §314A is based, have subsequently limited the use of §314A to cases involving only the special situation of police officers and disabled vehicles. *See Williams v. State*, 664 P.2d 137, 142 n.6 (Cal. 1983) (in rejecting the notion that the pedestrian's "dependence" on the patrolman was sufficient to establish a special relationship, the court noted: "[o]ne might well question whether the drowning man is not similarly dependent on the swimmer on shore; it is settled that there is no *legal* duty to come to the rescue.")

20. *Whitlock*, 744 P.2d at 55.

For instance, in *Donnell v. California Western School of Law*,[21] a student was mugged on the public sidewalk outside the institution. He alleged that the school had a special relationship to him as a student, and should have taken measures to patrol the city streets. Focusing on the facts that Donnell had left the campus and was an adult student, the court declined to find any special relationship, and dismissed his case. In essence, the court determined that, as an adult student, Donnell could not claim any dependent status while walking on public streets, where adults are routinely expected to exercise independent judgment as to the safety of present conditions.[22]

Duty Created by the Relationship of Landlord to Business Invitee

Advocates of judging a college's responsibility to its students by analogy to the business invitee standard measure liability by reference to the Restatement (Second) of Torts. The Restatement provides that a possessor of land who holds it open to the public is under a duty to protect its invitees against unreasonable risk of physical harm.[23]

Once again, a California case is the best example of the application of this theory.[24] Kathleen Peterson, a student at San Franciso Community College, was assaulted while climbing a stairway from a campus parking lot. The stairway was shrouded by untrimmed foliage. In addition, the complaint showed that the College knew similar assaults occurred in the area and failed to provide any warning to persons using the parking lot. The Court found that the College knew of the prior incidents, yet had done nothing to clip the foliage back to make it safe, and failed to warn the students of the risk. The *Peterson* court concluded:

> In the closed environment of a school campus where students pay tuition or other fees in exchange for using facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime. . . . Plaintiff was lawfully on the campus and was attacked in broad daylight in a place where school officials knew she and others as well as the assailants might be. Further, the warnings sought here would not result in pre-

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21. 246 Cal. Rptr. 199 (App. 4th Dist. 1988).

22. Other courts applying §314A have considered the dependency or not of a student-plaintiff and found for the institution. *See, e.g., Beach v. University of Utah*, 726 P.2d 413 (Utah 1986) (finding no university liability when student injured on university-sponsored field trip while voluntarily intoxicated), and *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 815 (finding no university liability when student injured in alcohol-related car accident on university premises.) A different result may occur, however, in a case when a university affirmatively assists its students, thus creating a dependent relationship, for example when providing dorm security.

23. Restatement (Second) of Torts §314A(3) (1965).

24. *Peterson v. San Francisco Community College District*, 685 P.2d 1193 (Cal. 1984).

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venting the students from using the campus or its facilities, only in alerting them to unknown dangers and encouraging them to exercise more caution.[25]

Another case using the business invitee theory arose in the context of a classic fall football game at Notre Dame, with its crowded parking lot full of tailgate parties and rowdy behavior.[26] The plaintiffs left the football game a few minutes early and, as they crossed the parking lot, a drunk, engaged in an unrelated scuffle, lurched into the plaintiff, Mrs. Bearman, breaking her leg. In response to the University's argument that it had no duty to protect a particular patron when it did not have notice of danger to that person, the Court followed Restatement (Second) of Torts §344. The Court concluded Notre Dame was the operator of a place of public entertainment, and therefore the University owed a duty to keep its premises safe for its invitees.

> Even though there was no showing that the University had reason to know of the particular danger posed by the drunk who injured Mrs. Bearman, it had reason to know that some people will become intoxicated and pose a general threat to the safety of other patrons. Therefore, Notre Dame is under a duty to take reasonable precautions to protect those who attend its football games from injury caused by the acts of third persons.[27]

To offset the extraordinarily expansive potential of *Bearman*, one should consider other courts' more restrictive readings of the business invitee analogy. The court in *Donnell v. California Western School of Law*, discussed earlier on page 9, recognized the applicability of the business invitee theory set forth in *Peterson*, but carefully limited liability to the premises in question. Relying instead on *Issacs v. Huntington Memorial Hospital*,[28] the *Donnell* court noted: "a defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess or control."[29]

Duty Created by the Relationship of Landlord to Tenant

A number of courts found it easiest to compare the student-college relationship to one of landlord and tenant. The obvious attractiveness to this approach is the fact that the student is often an actual tenant of the institution as a dormitory resident. Not surprisingly, therefore, courts which use this analogy tend to be dealing with cases involving injuries occurring in the dormitory.

The best example of a court's analysis of the duty arising from

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25. *Id.* at 1201.
26. *Bearman v. Univ. of Notre Dame*, 453 N.E.2d 1196 (Ind. App. 3 Dist. 1983).
27. *Id.* at 1198.
28. 695 P.2d 653 (Cal. 1985).
29. *Donnell*, 246 Cal. Rptr. at 201.

the status of a college as landlord involves a claim by the mother of a student who was raped and murdered in her residence hall at California State University at San Diego.[30] In rendering its decision, the California court first quoted *Kline v. 1500 Massachusetts Avenue*, the earliest reported case to find enhanced liability on the part of the landlord for failing to protect tenants against criminal conduct of third parties.

> The landlord is no insurer of his tenants' safety, but he certainly is no bystander. And where, as here, the landlord has notice of repeated criminal assaults and robberies, has noticed that these crimes occurred in the portion of the premises exclusively in his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.[31]

The *Duarte* court found, as had the *Kline* court, that the landlord-tenant contract creates an implied obligation on the part of the landlord to protect the tenant through the provision of those resources within the landlord's reasonable ability to provide. The California court looked closely at the relationship between the murdered student and the university, concluding:

> The contract between the University and Tanya was more than a leasing of space in a student dormitory. She submitted her security to control by the University. In this fact matrix an obligation arose to provide such protective measures which were within the University's reasonable capacity to thwart or diminish the possibility of a foreseeable assault.[32]

In reaching this conclusion, the court also observed: (a) the University knew of prior instances of crime in the dormitories; (b) the University knew or should have known that the student was away from home for the first time and was totally unprepared for the danger in the dormitory; and (c) by the application of the housing contract Tanya was required to deprive herself of the right to purchase and install security devices or to possess a dog or firearms; and, thus, she had submitted her personal security to control by the University. As a result, the institution's argument that it, like other common law landlords, had no duty to protect its tenants, was rejected.[33]

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30. *Duarte v. State*, 151 Cal. Rptr. 727 (Cal. App. 1979). The case has a curious history. Although the decision has been ordered "depublished" by the Supreme Court of California, *id.*, the case is cited by such authors as Keeton in *Prosser & Keeton on the Law of Torts*, §63, n.14 (5th ed. 1984); and Harper, James and Gray in *The Law of Torts*, §18.7, n.17 (2d ed. 1986) as an example of the use of the landlord-tenant relationship in the tort context. Thus, while it is not to be relied upon in California as good law, it is taken to be a prime example of this theory of negligence analysis by prominent commentators in the field.

31. *Duarte*, 151 Cal. Rptr. at 734 (quoting *Kline v. 1500 Massachusetts Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970)).

32. *Duarte*, 151 Cal. Rptr. at 735. There are limits, however, to a plaintiff's reliance on a university housing contract when imposing "contract" obligations on a university. For example, in *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 821 the court concluded "[t]he breach of the license agreement by one student imposes no contractual duty upon the Trustees in regard to another student."

33. *Id.* at 735.

In responding to a similar claim by a student who was raped in her dormitory room, the State University of New York argued that while the University was admittedly a landlord, the decision when to lock the exterior doors of the dormitories was an independent "police decision;" therefore the University should be immune from tort liability. The New York Court of Appeals found the University's argument insufficient to avoid liability, stating the basic rule that: "[a] landlord has a duty to maintain minimal security measures, related to a specific building itself, in the face of foreseeable criminal intrusion upon tenants."[34]

Nevertheless, the landlord/tenant analysis imposing an obligation on an academic institution remains restricted, and the former common-law principle—that the landlord had no obligation to the tenant—has been eroded rather than abandoned. In fact, some courts have flatly refused to accept the proposition that a college or other landlord has an expanded duty of care to a student tenant.[35]

NEGLIGENCE: FORESEEABILITY

Even if a court is satisfied that there is a sufficiently actionable relationship between the victim of a crime and the defendant university, it must look to the question of whether or not the criminal conduct giving rise to the injury could have been foreseen by a reasonable person in the institution's position.

Rejecting a Community College's argument that it had no duty to a student who was murdered while registering for classes, the Supreme Court of Arizona pointed out that, in fact, the student had identified his assailant to a security guard while in the same hall in which registration was taking place and had requested protection.[36] He received none. Finding that the institution, through the security guard, had specific and repeated notice of both the actor and the exact type of harm likely to occur, the court found for the plaintiff.[37]

While actual notice of a risk of criminal activity was also a part of the *Peterson* case discussed earlier on page 9, the facts demonstrating "forseeability" are not always so clearly in plaintiff's favor. For example, in *Relyea v. State*,[38] Donna Fink and Marlene Mahnke were kidnapped and murdered as they left an evening class at a remote building at Florida Atlantic University. Although the court was prepared to analogize the relationship alleged in the suit

34. *Miller v. State*, 467 N.E.2d 493 (N.Y. 1984).

35. *See, Rabel v. Illinois Wesleyan University*, 514 N.E.2d 522 (Ill. App. 4 Dist. 1987).

36. *Jesik v. Maracopa County Community College District*, 611 P.2d 547, 548 (Ariz. 1980).

37. *Id.* at 551.

38. 385 So. 2d 1378 (Fla. App. 1980).

brought by the murdered girls' parents to the landlord/tenant relationship, it turned first to the question of whether or not the criminal attack was reasonably foreseeable under the circumstances. The court found the evidence in fact showed no incident of serious crime in the seven years of the University's existence, thereby precluding any institutional liability for its failure to protect the two students, despite the existence of a duty of care.[39]

A similar case involved the abduction, rape and murder of a college cheerleader at North Carolina Wesleyan College.[40] Here again, the lack of foreseeability protected the college from any liability to the student as an invitee. The Court noted the evidence in affidavits presented by defendant showed only incidences of minor vandalism in the ten to twelve years prior to the assault. On the other hand, although an affidavit, submitted by the plaintiff from a victim of the same kidnapping, showed that inmates of a nearby detention center attended home basketball games and were probably at the game in question, the Court determined this evidence insufficient to support a finding that the College, as landowner, could have foreseen the crime in question.[41]

In a 1981 case involving a student who was shot by an outsider in the lobby of her dormitory, a Louisana court reached the same conclusion in a ruling that now seems curiously out of date:

> There had been some isolated incidents of violence on campus prior to plaintiff's enrollment. However, these isolated criminal activities were not sufficient to require Southern to warn all incoming dormitory residents of probable danger from criminal assault. There is no proof that living on campus increased the hazards above the ordinary.[42]

The difficulty with this interpretation of foreseeability is obvious. There is no way to determine how many prior acts engender foreseeability; how serious those acts must be; or what time gap between prior acts and the incident is relevant. Because of the "arbitrary results and distinctions" which the strict rule of foreseeability creates, the Massachusetts Supreme Judicial Court in the *Pine Manor* case, for example, declined to accept foreseeability as a preclusive test.[43] The *Pine Manor* court suggested, instead, that the more appropriate rule would be to treat prior criminal acts as simply one factor among others in establishing the foreseeability of the third party's action. Moreover, the Court also observed that since colleges, in fact, provide security services and often warn students about the risks of criminal activity on campus or in the area, there can be little doubt that such colleges have foreseen the

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39. *Id.* at 1383.

40. *Brown v. North Carolina Wesleyan College, Inc.*, 309 S.E.2d 701 (N.C. App. 1983).

41. *Id.* at 703.

42. *Hall v. Board of Supervisors Southern University*, 405 So.2d 1125, 1126 (La. App. 1981).

43. *Pine Manor*, 389 Mass. at 55.

possibility of criminal behavior, even if there has been no immediate history.[44]

An important aspect of the foreseeability question is that it is usually a factual matter left to the jury to decide. For example, in *Neiswand v. Cornell University*,[45] Cornell University protested that it could not possibly have known that a nonstudent, with a crush on a student, would enter her room without Cornell's permission and murder both the student and her roommate. The student's parents, however, responded with affidavits showing Cornell was on notice that the intruder had been a "pest" and had in fact been removed from campus on prior occasions. The court concluded that whether Cornell could have foreseen the criminal activity so as to give rise to liability, was a question for the jury.[46] A campus risk manager considering forseeability as a defense in reviewing a possible claim will need to take into account the likelihood that a jury's sympathy for an innocent victim will affect its decision on whether a crime was foreseeable.

There are, however, policy arguments which may persuade a court to refuse to allow the question of foreseeability to be considered as a factual matter. Such was the case in *Eiseman v. State of New York*,[47] in which Eiseman, an "early-release" convict, enrolled in a program at State University of New York ("SUNY") Buffalo. At the time he enrolled, Eiseman had an undisclosed history of violence, schizophrenic behavior and criminal conduct. Six months after enrolling, he murdered his roommates. The court concluded that, even if the College had known of Eiseman's past, the state's policy of rehabilitating convicts would be adversely impacted by permitting liability in the case. Therefore, the court refused to consider foreseeability, thus protecting the University from liability for the deaths. This type of reasoning offers interesting possibilities for defending an institution which can raise competing policy grounds for denying liability.[48]

Paradoxically, the rejection of the *in loco parentis* doctrine may also serve as a judicial limitation on determining foreseeability. For example, the policy argument for student adulthood may be used to prevent a jury from deciding whether or not certain facts gave rise to foreseeable conduct.

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44. This reasoning may impede a university from successfully limiting liability on the basis of "lack of foreseeability" if the university, in recognizing the possibility of campus crime takes precautionary measures to prevent it.

45. 692 F. Supp. 1464 (N.D.N.Y. 1988).

46. *Id.* at 1468.

47. 511 N.E.2d 1128 (N.Y. 1987).

48. For example, a college may argue that an open academic environment requires informal discussion and interaction among all members of the academic community. This environment would be destroyed if a college, in order to avoid liability for campus crime, was required to keep all students isolated from their peers.

> While it is 'reasonably foreseeable' that college students might drink in dormitory rooms, in order for the dorm to create a dangerous condition for which defendants could be liable pursuant to Government Code §830, the condition must create a substantial risk of injury when it is used with due care in a manner which is reasonably foreseeable. The idea of students congregating in a room and drinking to excess 'with due care' is incongruous in light of the apparent meaning of the statute. (Citation omitted.)[49]

In reaching this conclusion, the Court determined that an institution's failure to exclude alcohol from the dormitory did not create a dangerous condition which was the proximate cause of Cynthia Baldwin's injury in a subsequent off-campus automobile accident. The *Baldwin* court made the point that the determination of foreseeability has limits, and the recognition of student adulthood may be one such limitation. Thus, although it is reasonably foreseeable that students will drink in dormitory rooms, the anti-*in-loco-parentis* doctrine requires that the institution not assume that students will also act in an immature fashion and attempt to drive cars after drinking in their rooms. The complexity of this logic may well be one of the reasons why the *Pine Manor* court was so impatient with a pure application of the foreseeability requirement in assessing liability.

LIABILITY BASED ON CONTRACT

In actions brought by victims against colleges, in addition to negligence claims, plaintiffs may also allege the existence of a contractual obligation to supply the necessary relationship between the victim and the institution. At times, this theory is confusingly intertwined with the landlord/tenant and business invitee theories of negligence, as illustrated in the *Duarte* case discussed above on page 11.

> Secondly, Duarte contends that the University had a contractual obligation to Tanya arising from the terms of the landlord/tenant agreement as well as from an implied-in-law covenant of habitability requiring the University to provide 'a *safe* residence' . . . 151 Cal. Rptr. at 730.

Perhaps because of its unhappiness with the constraints of old fashioned tort theories in general, and foreseeability in particular, the Pine Manor court found the concept of a contractual relationship a very productive ground for finding liability. The court found a specific duty owed to the student by the college based upon the Restatement (Second) of Torts, §323, which imposes a duty on one who "undertakes, gratuitously or for consideration, to render

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49. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 820. (Cal. App. 1981).

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services to another which he should recognize as necessary for the protection of the other's person or things."[50]

Finding that: "Colleges generally undertake voluntarily to provide their students with protection from the criminal acts of third parties", the court concluded: "It is clear that this undertaking by Pine Manor was not gratuitous," and listed among its reasons the fact that the College required freshmen and sophomores to live on campus to enhance its revenues.[51]

On the basis of §323, the *Pine Manor* court concluded that because Pine Manor included security services as an "indispensable part of the bundle of services" offered to its students, and the students relied on such services, the court imposed a duty on the College to exercise due care to protect its students from forseeable harm.[52]

Other courts, however, have found the contractual claim tenuous. One of the causes of action alleged by Cynthia Baldwin in her complaint against California Polytechnic State University argued that the dormitory license agreement obliged the institution to enforce its rules prohibiting the consumption of alcohol on campus. By manifestly not enforcing the rules, and permitting the party at which alcohol was consumed by the driver of the car in which Baldwin was injured, the institute allegedly breached the contract. Apparently relying on the contractual doctrine of privity, the Court determined that "the breach of a license agreement by one student imposes no contractual duty upon the trustees in regard to another student."[53]

Another doubting court determined that the mere fact that the University equipped its building with security devices and hired security personnel was not sufficient to create a contractual obligation to provide protection or security services to the plaintiff.[54] It is unclear, however, whether this is a reasoned rejection of the *Pine Manor* rationale or a conclusion compelled by the fact that in 1987 Illinois had not accepted the landlord/tenant relationship as creating a duty of care.

SUMMARY

Without a doubt, there is a confusing maze of rationale for determining when a college will be made to pay for a loss suffered by the victim of a crime on its campus. What is worse, there is

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50. Restatement (Second) of Torts §323 (1965).
51. *Pine Manor*, 389 Mass. at 53.
52. *Pine Manor*, 389 Mass. at 53–54.
53. 176 Cal. Rptr. at 821.
54. *Rabel v. Illinois Wesleyan University*, 112 Ill. Dec. 889, 899 (App. 4 Dist. 1987).

no clear line of cases tending toward coherent analysis. When first announced, it appeared that the *Pine Manor* logic, which was substantially revisionist at the time, might open floodgates of University liability. Instead, it appears that its logic has not been as persuasive as initially anticipated and courts in subsequent cases in other states have rejected it outright, preferring, instead, close adherence to conventional tort analysis.

Where the doctrine of *in loco parentis* substituted colleges as "parents" for the independent judgments of their students, it also tended to remove institutions from the more usual categories of tort defendants. The "parent-child" relationship, in other words, limited the ability of courts to analogize educational institutions to other forms of business entities. With the abandonment of *in loco parentis*, courts have become much more willing to treat colleges as if they were simply an aggregation of different businesses. Thus, the college, as dormitory operator, is in a landlord-tenant relationship with resident students; as the operator of a place of commercial entertainment, it is a landlord with business invitees. The difficulty with this type of unbundling is that, it works as far as it goes, but it does not appropriately address all situations. For instance, what relationship exists between an institution and a pedestrian crossing an urban campus on a college-owned walkway?

The "dependency"-based approach favored by the *Whitlock* court offers substantial analytical advantages because it is useful to academic institutions for devising strategies to avoid injuries before they occur. A college should be able to anticipate situations in which members of the academic community will be said to be dependent upon the institution for their safety. For example, it is likely that most courts could find a special relationship based on dependency when a student is within a dormitory or a classroom.

The dependency analysis permits us, moreover, to distinguish among students based on reasonably objective criteria, such as maturity. Thus, a primary school would almost certainly be found liable for injuries caused on a public street to third graders, who are undoubtedly dependent on their teachers in traffic. The same liability would not apply, however, in the case of adult or near-adult students of a college or university who, ostensibly are not dependent on the institution for their safety in traffic.

It is also worthwhile taking a step backward to look at the value of foreseeability as an analytical tool. As already noted, it can be dangerously subjective. But, if used fairly, foreseeability can be used to prevent liability for criminal acts from being transferred to the institution, when truly spontaneous criminal behavior occurs. Viewed from this perspective, the issue becomes as much a policy argument as was, for instance, the protection of the rights of rehabilitated criminals in *Eiseman*. If each student is to be pro-

tected at all times from the possibility that a fellow student may become explosively violent, each will have to be held in a form of academic solitary confinement. But, such over-protectionism would utterly destroy our universities, which expect almost as much education to come from informal discourse among students as from lectures and papers. Only by conceding that colleges and universities cannot protect every student every minute of the day, and that some kinds of violence are simply unforeseeable, can universities continue to provide the education they were established to offer. A wise college-defendant would press this argument forcefully to a court in order to prevent the question of foreseeability from being left to a sympathetic jury.

CONCLUSION

Recognizing that this monograph is meant more to describe the law in a useful way than to speculate on what it may or should become, the following conclusions are offered.

1. **Institutions of higher education should expect to be held to the same standards of care applied to commercial businesses performing analogous services.**
   - When an institution admits members of the public to premises it either owns or controls, to engage in activities which are part of the institution's business, it must take reasonable care to identify the risk of criminal acts on its premises, and to warn its invitees of those risks or otherwise protect against those risks.
   - An institution that provides housing to students or employees under a lease or housing contract has an affirmative duty to protect tenants from foreseeable criminal activity in the lobbies, corridors and other common spaces.[55]
2. **In some states, institutions have a duty to persons who are dependent on the institution, requiring them to provide protection from the risk of foreseeable injury, including criminal acts.**[56]
   - The determination of when an individual or class of individuals is "dependent" involves both factual and policy considerations.
   - A finding of dependency is affected by the extent to which individuals are given adequate information to reach a mature judgment on the degree of risk in view of the institution's

55. This standard is not applied in all states.

56. This standard is thought to be a developing consensus. *See* Restatement (Second) of Torts §314A (comment b) (1965).

ability to provide protection. For example, a student who is fully aware that the institution cannot always prevent dormitory residents from propping open exterior doors should not depend on the college when making a judgment whether or not to leave an otherwise protective dorm-room door unlocked at night.

3. **When an institution has committed itself in its publications to an enhanced duty to protect members of its community, or has created an expectation among the general public that it has made such a commitment, it will be liable for criminal acts occurring on its premises, unless such acts are unforeseeable.**[57]
   - Liability based on contractual obligations can be managed by careful review of institutional publications and by published disclaimers of institutional ability to provide protection from specific risks.
   - The public expectation of responsibility appears likely to be measured by policy arguments similar to those applied in the "dependency" and landlord-tenant situations.
4. **An institution may not be able to claim that a particular criminal act was unforeseeable unless it can prove that no similar conduct occurred on its campus in the five years prior to the incident in question.**
   - If left to the trier of fact to determine, foreseeability is very likely to be a subjective judgment.
   - The antidote to the subjective nature of foreseeability is often a policy argument.

57. The commitment to provide services gives rise to "contractual" liability and is of general application; the "public expectation" standard, however, applies only in jurisdictions where *Pine Manor* is good law.

Part II:
Statutory Liability for Crime on Campus

In addition to the common-law liability reviewed in Part I, a new wave of state and federal statutes have been developed which make colleges and universities directly and/or indirectly liable for criminal acts occurring on their campuses. These acts require the careful attention of those administrators responsible for reducing institutional liability for the costs of criminal conduct. To some extent, these statutes are based on legislative outrage at institutional refusal to accept responsibility for crimes commited on their campus, an outrage similar to that of the judges who wrote the *Pine Manor* opinion. And to some extent, they are in response to the increased incidence on campus of both substance abuse and violent crime, the latter of which, until recently, was covered up far more often than it was publicized.[58]

The general manner in which colleges and universities impose discipline for substance abuse only rarely parallels the criminal laws which would otherwise apply if the same conduct were to occur off-campus. At the same time, it is readily apparent that increased substance abuse has led to an increase in violent crime on campus. It is not at all surprising, therefore, that legislators have found both of those issues to be fertile sources for popular legislative initiatives.

As outlined below, there are four quite distinct ways in which these various new statutes impose liability on academic institutions. Some statutes provide for the direct criminalization of university conduct. Others stipulate that failure to comply with crime prevention statutes may result in a loss of federal funding, a virtual death knell for most institutions. Still others may create a protected class, the members of which can hold the institution to "strict liability" when injury is suffered in conjunction with a failure to comply with the statute. And lastly, some statutes create an ancillary quasi-contractual duty which if breached is a free-standing ground for liability.

DIRECT CRIMINALIZATION

The most readily apparent risk to college administrators in these new statutes arises from laws making institutions and their administrators criminally liable for prohibited activities of others occurring on campus. For example, a number of recent state

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58. Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101–542, 104 Stat. 2381 (1990). *See also* M. Smith, *Coping with Crime on Campus* 17 (1988).

statutes, reacting to the deaths of fraternity initiatees, have made institutional failure to prohibit hazing a crime. The proponents of these acts have made it clear that their primary intent in developing these initiatives is to effectively prohibit hazing by making universities bear the risk of criminal behavior.

One example of the more burdensome statutes is Ohio's, which provides that "[n]o administrator, employee, or faculty member of [an] educational institution, public or private, shall recklessly permit the hazing of any person."[59] Violation of the statute is a misdemeanor in the fourth degree. Likewise, in Rhode Island, any school official who "knowingly permits" hazing to occur is guilty of a misdemeanor.[60]

Somewhat less extreme is Massachusetts' version of the anti-hazing law. Massachusetts places a duty on anyone who is present at the scene of a hazing incident, and can report the crime to law enforcement personnel without danger to self or others, to in fact do so.[61] Failure to report a hazing incident is punishable by a fine. While some institutions may deem it unlikely that they would ever be criminally liable under this statute, they should keep in mind that campus security officers may be called upon to break up a pledge party, and find themselves obligated to report any hazing, or that an administrator responsible for the Greek System, *i.e.*, "Coordinator of Greeks," may have been present at what evolved into an incident of hazing.

Among other state statutes which potentially increase a college's liability are those that require an institution to report the incidence of crime on campus. The leader in this area has been Pennsylvania, which enacted the College and University Security Information Act[62] in 1988 at the instance of the Clery family, whose daughter was murdered in a Lehigh University dormitory. Since then, several other states have passed similar laws.[63]

The Pennsylvania statute requires all Pennsylvania colleges and universities to publish, and provide on request to applicants and employees, an annual report detailing on-campus crime statistics for the most recent three-year period. The published reports must also detail the school's security features, policies, and procedures. Colleges are required additionally to apprise all applicants of the report's availability. Failure to comply with any of these requirements can lead to a $10,000 fine by the Attorney General.[64] Cam-

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59. Ohio Rev. Code Ann. §2903.31 (Baldwin 1989).

60. R.I. Gen. Laws §11-21-2 (1989).

61. See Mass. Gen. L. Ann. ch. 269 §18 (West 1989).

62. 24 Pa. Cons. Stat. Ann §2502 (Purdon 1989).

63. These states include Connecticut, Delaware, Florida, Louisiana, New York, Tennessee, Virginia, Washington, and Wisconsin.

64. 24 Pa. Cons. Stat. Ann. §2502–5.

pus police chiefs who are inclined to follow the tradition of covering up crimes to avoid public outcry would be well-advised to heed these statutes.

FEDERAL FUNDING

Even more devastating than those statutes which impose criminal liability are those which subject an institution to the loss of federal funding should it fail to comply with federal statutes enjoining institutional opposition to crime on campus. For example, the federal "Crime Awareness and Campus Security Act of 1990"[65] requires colleges and universities to distribute annually an updated report on campus security procedures, security limitations on access to campus facilities, and the incidence of crime on the school's campus for the previous three years. More significantly, the Act would also impose a duty on the college to make "timely reports" of campus crime to students and employees in a manner designed to avoid additional crimes. A college or university's failure to comply with the Act would ultimately lead to a loss of federal funding.

Because student use of drugs and alcohol often plays a critical role in campus crime for both victims and perpetrators, two recent federal laws require educational institutions to participate in "The War On Drugs" as a condition of continued receipt of federal funds.[66] Colleges stand to lose all federal funding should they fail to adopt and implement satisfactory programs to prevent the illegal use of drugs or alcohol on campus.

An interesting complexity of the Drug Free Schools Act is that the legislation requires institutions to impose disciplinary sanctions against substance abusers "consistent with" state and federal criminal sanctions for the same conduct.[67] This provision arguably also requires the academic institution to provide a full panoply of due process procedures when disciplining a student or employee.

In addition, if the "consistent with" language mandates the imposition of institutional sanctions equivalent to state and federal criminal codes, it may, in effect, convert private institutions into state institutions subject to the full limitations of constitutional law.[68] As a consequence, if a private institution fails to apply

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65. Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101–542, 104 Stat. 2381 (1990).

66. The Drug-Free Schools and Communities Amendments of 1989 to the Higher Education Act of 1965, 20 U.S.C. §1145g. The Drug Free Workplace Act of 1988, 41 U.S.C. §§701–707.

67. 20 U.S.C. §1145g(a)(1)(E).

68. *Cf. Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988) (private college not a state actor because state law required only that college have disciplinary policy and did not specify penalties for rule violations.)

the requisite due process, it may face federal civil rights litigation by students claiming they were expelled without proper procedure; claims from which the institution is presently exempt.

The second recent federal statute regulating drug use is the Drug Free Workplace Act of 1988,[69] which affects colleges with respect to federally-funded programs greater than $25,000, such as government-sponsored faculty research projects. The Act requires colleges to inform employees working on such projects (e.g., faculty, research assistants and students) that illegal drug use is prohibited in the workplace, and that such illegal use may result in the violator losing his/her job or grant.

Moreover, college employees working on federally-funded projects must report to the employer any convictions for drug use in the workplace, and the college must impose a sanction or require rehabilitation in the wake of such convictions.[70] And finally, the college or university must report employee drug convictions to the federal agency that has funded the project.[71]

Failure to comply with these requirements can deprive a college or university of its status as a "responsible source" for government contracting, and result in the institution's debarment from all federal contracts or grants for up to five years. While these are potentially nuclear sanctions, they apply only to specific government contracts, not to the institution as a whole.[72]

STATUTORILY-CREATED TORT LIABILITY

NEGLIGENCE PER SE

In addition to the threat of criminal liability and lost federal funding, academic institutions must be aware of potentially heightened tort and contract liability which may flow from federal and state statutes regulating anti-crime activities.

While the preceding section described the common-law duty of care towards members of the campus community, this section examines a statutorily-created duty of care, which, if breached, may result in civil liability for the college or university. As described by Professors Prosser and Keeton:

> When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard

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69. 41 U.S.C. §§701–707.

70. 41 U.S.C. §702(a)(1)(D). It should be noted that students receiving Pell Grants are also covered under The Drug Free Workplace statute, and upon receiving such grants student must certify to the government that they will not "engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance." 41 U.S.C. §702(a)(2).

71. 41 U.S.C. §702(a)(1)(E).

72. For a more detailed overview of this act, *see* L. White, *Complying with "Drug-Free Workplace" Laws on College and University Campuses* (1989) (NACUA Publication).

> for all members of the community, from which it is negligence to deviate.[73]

Accordingly, if a court determines that a particular statute involving campus crime is designed to protect the plaintiff against the very type of harm resulting from the statutory violation, the court may find negligence as a matter of law.[74]

Violation of a statute as a basis for tort liability may be illustrated through examination of the anti-hazing statutes of Ohio and Rhode Island. The argument would run as follows: the imposition of criminal liability on college administrators for knowingly or recklessly permitting hazing creates a community standard prohibiting hazing. The statute also makes the victims of such hazing a recognized class. By permitting hazing in violation of the statute, the college is necessarily negligent. Viewed this way, the statute creates a "super tort," and, as a consequence of the breach of the statutory duty, the court does not have to search for a duty on behalf of the college toward the student.

For example, an Illinois court, interpreting that state's anti-hazing statute, held that the statute created a protected class of potential hazing victims to whom the violators, a fraternity, owed a duty of care. Therefore, the court held that because of the policy behind the statute, the student victim's consent to hazing did not negate his right to sue.[75] By contrast, under the common law negligence theories discussed in Part I, the plaintiff's willingness to participate in the ritual would have prevented or limited recovery.

In a similar way, the Drug-Free Schools and Communities Amendments may have created negligence per se liabilities. Colleges and universities have a duty, under the Amendments, to inform students of the risks associated with drug abuse. In this example, plaintiffs could argue that a school's failure to inform them of the risks of drug abuse breaches a duty to them, and the absence of knowledge of the risks involved led to use of illegal drugs, with consequent injuries.

A final example of the need to read these statutes carefully comes from the language of the Federal Crime Awareness and Campus Security Act referred to above. This recently enacted legislation contains a provision requiring "*timely*" crime-incident reporting to each student and employee of an institution. If a student who had not received actual notice of a mugging promptly after it occurred was subsequently the victim of an assault, the

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73. *Prosser & Keeton On Torts* 220 (5th Ed. 1984).

74. *Id.* at 230. Some courts, however, find that violation of the criminal statute is only evidence of negligence, which may be accepted or rejected by the jury. *Id. See, e.g., Allen v. Dhuse*, 104 Ill. App. 3d 806, 433 N.E. 2d 356, 360 (1982) (finding of negligence rebuttable by proof that party acted reasonably under circumstances despite violation).

75. *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 107 Ill. Dec. 824, 507 N.E.2d 1193, *appeal denied*, 116 Ill.2d 575, 515 N.E.2d 125 (1987).

negligence per se doctrine could arguably prevent the institution from raising defenses such as contributory negligence or lack of forseeability.

BREACH OF CONTRACT/NEGLIGENT MISREPRESENTATION

A final source of common-law liability arising from the passage of campus-crime reporting statutes, is quasi-contractual obligations, and breach thereof, created intentionally or inadvertently by these statutes. Since some of these statutes require institutions to describe the security procedures and features of their campuses, as well as the crime rates experienced in recent years, any deviation from those procedures, resulting in less security to a student, could be construed to be a breach of contract if a student or employee is subsequently injured in a campus crime. A victim of such crime could readily assert that his or her injury would not have taken place if the institution had provided the security described in the statutorily-mandated report.

Similarly, failure to report crimes accurately could give rise to a claim that the institution had misrepresented the safety of its campus, and the duty to report mandated by the statute would then create the community standard without need for additional evidence. College and university administrators and legal counsel must take care, therefore, that compliance with these statutes is taken very seriously, and that it does not simply become a matter of "paper pushing."

Part III:
Achieving Reasonable Campus Security

It should be clear from the catalog of potential liabilities listed in Parts I & II that institutions of higher education must take steps to manage the risk of crime on campus. As the pressure of litigation began to increase in the 70's and 80's, many institutions did, in fact, set out to establish more formal policies and procedures to manage the campus-crime risk. Part III synthesizes the published information and offers suggestions for organizing it in a useful manner.

Two points must be made by way of introduction. One is that there is no "right answer" to how much or what kind of security a campus should have. American colleges and universities are too diverse in size, location, applicable law, and risk to claim that there is one universal formula. Second, too much devotion to preventing crime on campus is almost worse than too little. Students locked away from themselves, let alone the outside world, cannot be educated. It is essential that the tension between an ideal academic environment and an entirely safe campus be understood by college administrators and judges alike.

There are five basic components to a comprehensive security plan: 1) education, 2) compliance, 3) prevention, 4) periodic review and modification, and 5) crisis management and investigation. Each of these components is examined in detail below.[76]

EDUCATION

Perhaps the most important—and most cost-effective—aspect of campus security, is teaching all members of the college community how to maximize their own safety as well as that of others on campus. Since colleges are in the business of education they should be well qualified to initiate effective programs in this area.

Responsibility for campus safety however, is not solely the province of police and security personnel; it requires the cooperation of everyone affiliated with the institution. All too often, the professional educators and the students themselves are left out of the conceptualization and design of an institution's program of safety instruction. Given the low cost and high effectiveness of safety education in avoiding crime, an institution should make sure all of its best resources are consulted on how to educate most successfully the campus community on this vital topic.

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76. The author is indebted to the NACUA and ACE for permission to use parts of their publications *Crime on Campus* and *Achieving Reasonable Campus Security* in this section.

Students are notorious for the inventiveness of their attempts, and the regularity of their success, at sabotaging security programs and devices designed to protect them. Nevertheless, institutions should continue to promote increased safety, using any one of a multitude of approaches, including the following:

- Pamphlets can address specific issues more effectively than blanket warnings.
- Freshman orientation can be used to schedule programs concerning campus security. Institutions which conduct midsummer orientation reportedly find that students are particularly impressionable to safety information at that time, before they have been exposed to the general campus environment.
- Residence staff in dorms should hold periodic meetings to address safety issues and to build community awareness.
- Posters and flyers placed around campus can alert community members to basic safety information.
- Informational videos can be an effective means of transmitting safety tips.
- A "police report" column in newsletters or campus newspapers can keep community members aware of incidents of crime on campus.
- Organized group discussions can focus on unsafe behavior and why it occurs.

In addition, administrators should be as innovative as possible when deciding how to educate the campus community, although what works on one campus may not be effective on another. In some cases, detailed information may be important; in others, a simple cartoon which conveys a powerful message may suffice.

The following list includes some specific areas which institutions have chosen to emphasize in security awareness programs.

- **Basic Security Risks and Procedures.** Institutions should consider providing students with basic safety information. Because of the common misperception of the campus as a safe haven from the "real world," periodic reminders of seemingly obvious facts can be important. For example, students should be encouraged to: lock dorm rooms; travel in groups, especially at night; take advantage of all available security resources; be aware of one's surroundings; be cautious of strangers; be aware of suspicious behavior; know whom to contact in the event of a security emergency; immediately report all incidents to proper authorities.
- **Drug & Alcohol Education.** Student use of drugs and alcohol creates two major security problems. First, a majority of student-on-student crimes involve use of substances by the perpetrator.

Second, persons under the influence of intoxicating substances are much more likely to be victims of crime. Awareness of the dangers posed by drug and alcohol consumption is imperative for reducing these risks.

- **Tolerance Programs.** Because there is a growing problem of violence against students motivated by racism, sexism, homophobia, and other forms of bigotry, colleges should enforce their rejection of intolerance toward any member of the community.
- **Prior Incident Information.** Colleges should maintain files on the kinds, frequency, dates, times, location, etc., of all crimes committed on campus, and communicate such information to students in useful forms.
- **Student/Police Relations.** Institutions should promote a cooperative relationship between students and security personnel. Students should be convinced that such personnel are on campus to protect them, rather than to restrict them. Security staff should be encouraged to be friendly and accessible to the students.
- **Self-Defense.** It may be appropriate to provide information to the students and staff regarding where they can obtain self-defense training in the local area. An institution may choose to provide such training itself, either as an extracurricular service or within a credited physical education program.
- **Awareness of Surroundings.** Institutions should inform campus members of known security risks which exist on campus and in the surrounding community.
- **Availability of Security.** All members of the campus community should be made aware of the institution's security posture, including, for example, the availability of an escort service or the existence of emergency telephones. A security measure is only effective if people know about it. However, an institution should never state or imply that it has a security capability when in fact it either does not or cannot provide it to every possible person in need. Each school should be completely accurate whenever publicly disclosing or discussing its security posture.
- **Date Rape.** Some institutions have promoted awareness among students about acquaintance rape, including defining and explaining the problem.
- **Sub-Groups.** It may be appropriate to disseminate security information that is tailored to the activities of specific subgroups of the campus community, such as commuting students, resident students, and night-staff employees.
- **Emergency Telephone Numbers.** At least once a year, institutions should provide everyone in the campus community with a

listing of critical emergency telephone numbers, such as campus security, local police, rescue squads, hospitals, and the fire department. This can be done in student and staff handbooks, or in a campus telephone directory. Some institutions have found that it is effective to distribute cards or stickers containing important numbers, to be placed on or near telephones.

COMPLIANCE

Institutions should establish procedures to ensure compliance with existing laws affecting security issues on campus, and they should diligently monitor the passage of new federal, state, and local laws and regulations which may affect their campus. This can effectively be done by designating an individual who would be responsible not only for monitoring, but also for implementing, both new laws and any changes to existing laws.

A number of statutes affecting security issues on campus were discussed in Part II of this monograph. The following are examples of procedures that may be appropriate for institutions to adopt (depending on the applicable law in each jurisdiction) in addressing these statutory obligations.

- Disciplinary procedures to handle incidents of fraternity hazing.
- Programs to prevent and handle incidents of drug and alcohol abuse.
- Educational programs specifically addressing fraternity hazing and abuse of alcohol and drugs.
- Maintenance of files detailing crime statistics on campus, and reporting procedures for those files.
- Reporting procedures regarding the institution's security features and security policies.

Similar types of procedures should be considered in response to new statutory obligations.

PREVENTION

The establishment of a comprehensive system of crime prevention must be tailored to the specific security needs of particular campuses. There are, however, numerous issues which should be considered by all institutions.

COST EFFECTIVENESS

Different institutions have varying degrees of fiscal health, but it is safe to say that all colleges have some limitation on available

resources. The more an institution spends on crime control, the less money is available for educational activities. Thus, it is imperative that institutions make wise choices regarding how to spend their security dollars. Colleges should strike a balance between measures which are "high tech" (emphasis on sophisticated locks, alarms, etc.) and those which are "low tech" (emphasis on human presence, such as foot patrols). The proper balance depends in large part on careful consideration of the cost effectiveness of every expenditure. There are very persuasive sales people pushing high cost products who thrive on confusing campus administrators. In the end, the real question is how effective a product or service will be when used on campus, with students who often don't want to be protected.

Thus, an important factor when considering "high tech" is the extent to which students and others are able to effectively sabotage and disable a system. For example, an intricate card-access lock may not be superior to a security guard stationed at a dorm entrance, if students routinely prop open the doors. On the other hand, some institutions may find that non-human security measures are the most efficient and effective means of crime control on campus.

Every institution should conduct a study, either through a campus committee or by outside consultants, of the security posture best suited for its particular needs. Administrators should look carefully at their security needs and their crime control budget, and then determine the kinds of prevention systems best able to effectively address those needs. If in fact an institution conducts such a cost/benefit analysis, it should document the study and the conclusions drawn therefrom.

ESTABLISHING A PREVENTION SYSTEM

The following are some important considerations institutions should be aware of when deciding how to minimize violent crime on campus.

Personnel: Staffing and Training

The particular needs of a campus will determine the size, scope, and constitution of its security staff. All institutions, however, should consider the following safety/security issues:

- Whether it is necessary or advisable to have a public safety force with police powers, such as the authority to arrest and to carry weapons.
- The extent to which it is prudent to utilize students to assist in security on campus.

- Whether it is necessary or advisable to increase the involvement of local police in matters of campus crime and safety.
- Whether it is necessary or advisable to contract out the services of a professional security force.

After an institution establishes the scope and make-up of its security force, it should develop procedures to effectively implement its system. The following are examples of procedures already in place at various institutions:

- An institution that maintains or contracts for a security force should provide its officers with training commensurate to their functions, which includes basic training, as well as instruction focusing on the specific needs of that campus. The security personnel should be adequately screened, trained, equipped, and supervised by the institution and/or its contractor.
- An institution should have an established pattern of communication and relations with the local police. It may be advisable to develop a formal agreement with the local police department, clarifying the respective jurisdiction of each and the circumstances in which they are to assist on security matters.
- An institution that does not have security officers with the authority to make criminal arrests should establish a rapid and effective means of communicating security emergencies to local police or other back-up security personnel with arrest powers.
- If security officers are authorized to carry guns or chemical deterrents, the institution should establish that:
  a. weapons are carried only by officers satisfying legal requirements;
  b. officers' qualifications for carrying such weapons are reviewed periodically;
  c. strictly enforced procedures govern the securing of such weapons when officers are off duty; and
  d. a clear written policy governs every use of such weapons.
- An institution that employs students in part-time security patrol jobs should ensure that such students are supervised by responsible members of the security department.
- An institution sponsoring special events, such that it can reasonably anticipate that its regular security force will not be adequate, should retain supplemental security service; the institution should define the duties of such personnel so that all necessary security functions are covered.

Grounds Security

Establishing an adequate system of grounds security requires careful consideration of the physical surroundings of the campus.

the relationship between security and academic freedom, issues of cost effectiveness, and other needs and constraints of the respective campuses. The following are examples of programs implemented by some institutions for grounds security.

- **Outdoor Lighting.** All authorized entrances to student housing buildings should be sufficiently illuminated after dusk to permit observation of persons loitering in the vicinity. Lighting should be distributed about the rest of the campus to cover building entrances, pathways, parking facilities, and other open areas where students must travel after dusk.
- **Escort and Shuttle Service.** Escort services are widely utilized as a risk management tool. If utilized they should be made effective. The shuttle should operate among the most active areas on campus, such as the dormitories, library, and classrooms. The shuttle schedule should be obvious (e.g. every hour on the hour) and readily available to students. Pick-up stations should be well-lighted and in safe locations. The escort service should be well publicized, and stickers with its phone number should be placed on all campus telephones. Each institution should consider placing a telephone with a free line to the escort service in each building, as well as a free line at entrances to campus so that students returning at night can call for an escort. Vehicles used for both escort and shuttle services should be marked as such, and drivers should have clear university identification cards that passengers can see before entering. Drivers for both the escort and shuttle services should be properly screened, trained, and supervised.
- **Landscaping.** Careful maintenance of trees and shrubs to reduce risk of criminal activities is an important aspect of crime avoidance.
- **Emergency Phones.** Each institution should consider whether it is necessary and feasible to utilize emergency telephones at various locations on campus. Such phones can be wired directly to a campus police switchboard so that when a student picks up the receiver, the phone immediately rings at the police station and identifies the location of the caller.
- **Rape Whistles.** Institutions should consider providing rape/assault whistles which can fit onto a key chain. Institutions can also inform students about the availability of more sophisticated portable alarm devices.
- **Separate Uses.** When a building is used for more than one purpose (e.g., dining hall in basement of dormitory), so that some people have a right of entry for one but not for the other, institutions should consider separating entrances and access.
- **Card Access.** Some institutions have installed a card-access

system to replace traditional keys for entrance doors to buildings. When a card key is lost or stolen, its code can be easily deleted from the computer system, thus denying access to whomever possesses it. The user can get a new card, with a new code, and the institution would not have to replace any locks.

- **Closed Circuit Monitors.** Some institutions have installed closed-circuit television monitors in high-risk areas, with the video being transmitted to the campus police station. Such areas include dormitory entrances, parking lots and garages.
- **Panic Alarms.** Some schools have placed alarm buttons in dormitory rooms, women's locker rooms, and bathrooms to be easily accessible in emergency situations. When pushed, the buttons transmit the location to a campus security switchboard, and an alarm sounds in the room. Another option for bathrooms and locker rooms is a "trolley cord" alarm system. The cord is similar to a stop cord on a city bus, and would hang around the entire wall of the room. When pulled, an alarm goes off in the room and the location is transmitted to campus police.
- **Security Patrols.** Each institution should consider utilizing student or security force foot patrols, especially at night. Security staff may also patrol campus in a vehicle such as a golf cart, which would enable them to make more rounds while still permitting access to walking paths.
- **Master-Key Control.** Each institution should maintain and document adequate procedures to ensure that access to master keys is restricted. Master keys should be issued only in circumstances of clearly-defined need. If a master key is lost or stolen, all locks should be immediately changed.

Student Housing

Security issues relating to student housing fall into two areas, supervision and access.

Supervision. Many institutions use non-students or graduate students to supervise undergraduate housing, often in conjunction with specially selected undergraduates. When undergraduates are the sole supervisory presence, they should be upperclassmen in good academic standing and should be screened for maturity and judgment. Student-housing supervisors should be recognized as an integral part of the campus' security system and trained accordingly.

Access. Individual institutions with resident students should assess the feasibility and desirability of having and enforcing rules restricting access to student housing. Those institutions that choose to restrict access of non-residents have numerous options available, including:

- Locking all exterior doors to student housing buildings, either at all times or at night. The institution would then issue keys to residents and to those staff who need access to the building.
- Installing a two-barrier locking system for student housing, which requires a key not only for exterior doors, but also for inside doors and elevators.
- Replacing first-barrier locks with a push-button, number combination locking system. This might reduce student incentive to prop open doors to avoid carrying a dorm key.
- Installing peep holes on all individual room doors.
- Implementing policies relating to coed dormitories and opposite sex visitation at single-sex dorms, such as:
  a. Making single sex dorms available to all students who request them;
  b. Restricting visitation by members of the opposite sex in single-sex dorms, including the areas of visitation, times of day when visitation is permitted, and permitting visitation only when the guest is both signed in and signed out by the host student;
  c. Implementing rules relating to the special concerns of coed dorms.
- Placing delayed alarms on all exterior doors, so that if a door is propped open a signal sounds in the campus security office after a designated number of seconds elapses, thereby deterring students from cutting the alarm wires.
- Restricting general access to dormitories to a single entrance door, and installing alarms on all of the fire doors. The alarms would sound immediately upon the door being opened, both at the location of the door and in the campus security office.
- Installing a free phone line or buzzer outside of each housing unit which enables visitors to contact residents in their individual rooms, reducing the incentive for students to prop open exterior doors.
- Placing proctors at the entrance of each student housing building to monitor access, either at all times or only at night. There are a number of options for how strictly the proctor might control access:
  a. Unrestricted access could be permitted only for residents and residential staff, or it could be extended to anyone with university identification.
  b. For those to whom access is restricted, institutions may require that they be signed in and signed out by a resident or residential staff member. Residents would be responsible for

remaining with their guests at all times while they are in the building.

c. Institutions may require that all guests leave a license or picture identification with the proctor while they are in the building.

d. Proctor desks could be equipped with a panic alarm to the campus security office, as well as a phone line to each room, to alert residents when a guest is visiting.

- Ensuring that all doors and locks on individual rooms are adequate to prevent unauthorized entry.
- Installing effective locks, security screens, security bars, or other similar devices on all windows which are accessible to intruders.

PERIODIC REVIEW AND MODIFICATION

Each institution should establish procedures for the periodic review its of security measures, and modify such measures as necessary. The following are steps which some institutions have adopted:

- On a regular basis, the institution conducts a general safety and security review of the entire campus to determine any areas of potential risk, and any ways in which the safety profile of the campus can be improved. New technologies and prevention systems are also studied on a regular basis to determine whether they would be feasible or worthwhile adopting.
- The institution establishes procedures for reviewing and repairing any problems with the existing security apparatus. It is imperative that the Public Safety Department work closely with other departments on campus, particularly Physical Plant, in maintaining and repairing the crime prevention system. These two departments, therefore, need to establish communication and cooperation pathways.
- The institution establishes procedures dictating that physical plant staff give highest priority to maintenance and repair work orders involving security. A feedback network should be established between maintenance staff and public safety so that if there are problems or delays in repairing or replacing systems, public safety can arrange for alternate means of security in those areas.
- The institution establishes a program of periodic checks of outdoor lighting, alarms, locks, and other prevention systems used by the college.
- Institutions that employ escort drivers, shuttle drivers, dormitory proctors, and other security staff conduct random undercover checks to ensure that proper procedures are being followed.

- The institution establishes a standing committee for security issues, to be comprised of representatives of all members of the college community, including faculty, staff, and students.
- The institution periodically examines its campus for excessive plant growth or debris that may materially detract from security.
- The institution ensures that all staff responsible for security, particularly public safety and residential life staff, receive continuing training to the extent necessary.
- The institution has in place formal procedures for disciplining responsible members of its staff officers who fail to perform their security duties.
- An institution which contracts for security personnel has documented procedures for communicating complaints about the performance of officers.
- The institution establishes a system to record complaints by students and staff regarding problems with security systems, security breaches, threatening or dangerous behavior, suspected criminal acts, and other similar incidents. Institutions should always take security complaints seriously.

CRISIS MANAGEMENT

Colleges must be aware that some criminal incidents are an inevitable part of modern life, no matter how good a prevention system is in place. While not all incidents can be avoided or prevented, they must all be managed once they occur. Thus, each institution should establish a system for the prompt and effective management of security emergencies and crisis situations.

PRE-CRISIS PROCEDURES

- Each institution should establish a Crisis Management Team, which would be responsible for oversight and implementation of the college's response to a security emergency. The benefit of having a team designated in advance of a crisis far outweighs the cost of having a campus-wide rehearsal.
- The Crisis Management Team should include representatives from the campus departments that are most critical during an emergency situation, including security, counseling, legal, public relations, student services, and senior administration.
- The Crisis Management Team should meet periodically to prepare response procedures, rehearse with life-like scenarios and review responsibilities.
- Each institution should develop sets of "protocols," which outline

the appropriate responses to specific events, such as rapes, assaults, bomb scares, etc.

- Each institution should establish in advance communications systems so that the Crisis Management Team can be assembled, and do what is needed, even when the daily campus routine is disrupted.
- Each institution should adequately train all of its staff regarding how to handle any type of emergency that may arise. In addition to the training they receive generally, student staff, such as Resident Advisors, should have written procedures to follow regarding which full-time staff members to contact in an emergency.
- Each institution should designate an appropriate, high-level administrator who will be responsible for dealing with a crime victim and the victim's family. It is important to manifest to the victims and their families the importance that the institution places on the incident.
- Each institution should designate a single spokesperson to control the information flow to the campus community, the public, and the media.
- Each institution should ensure that appropriate procedures and channels of communication are in place so that campus police can respond adequately and promptly to a criminal incident.

CRISIS RESPONSE

- Each institution should provide immediate attention to the victim or victims of a criminal incident. Trained counselors should be available to care for the victim. Family members should be contacted as soon as possible. Tending to the needs of victim and family in a prompt, sensitive, and efficient manner is paramount after a security emergency.
- Each institution should ensure that a victim's administrative concerns, including speaking with appropriate officials regarding class schedules, examinations, tuition payments, etc., are handled.
- Each institution should offer support and guidance to the campus community, recognizing the effects a criminal incident can have on everyone connected to the college.
- Each institution should ensure that, even though the immediate focus is on a major incident, general campus security is maintained.
- Each institution should prepare information releases about the incident, striking a balance between the privacy concerns of the victim and the desire to alert the community.

- Each institution should conduct a professional investigation of the incident, including an internal audit to detect signs of negligence.
- Each institution should coordinate all responses to the incident in conjunction with legal counsel, and a strategy should be prepared in the event of a lawsuit.
- Each institution should provide continuing personal and academic support to the victim, and assist in reintegrating the victim into the campus community. Each institution should also arrange for the victim and other affected individuals (such as roommates) to receive ongoing counseling, if they so desire.
- After any criminal incident, each institution should reevaluate its security plan to determine whether the incident was reasonably preventable and, if so, what measures should be taken to improve the plan.

Additional Resources

Report on Current Security Practices and Policies Among AICUM Institutions. The Community Security Standards Committee, Association of Independent Colleges and Universities in Massachusetts, 1984.

Responding to Campus Crime: A Guide for Administrators. United Educators Insurance Risk Retention Group, Inc.

College Security Report. The Newsletter of Public Safety, Crime Prevention, Asset Protection, Liability Insurance, 1988–1990.

Responding to Violence on Campus, New Directions for Student Services. Jan M. Sherrill, Dorothy G. Siegel, Editors, 1989.

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